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No. 04-108

Supreme Court, U.S.
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In The Supreme Court of the United States

SUSETTE KELO, THELMA BRELESKY, PASQUALE CRISTOFARO, WILHELMINA AND CHARLES DERY, JAMES AND LAURA GURETSKY, PATAYA CONSTRUCTION LIMITED PARTNERSHIP and WILLIAM VON WINKLE,

Petitioners,

v.

CITY OF NEW LONDON and NEW LONDON DEVELOPMENT CORPORATION,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Connecticut

BRIEF IN OPPOSITION

WESLEY W. HORTON*
DANIEL J. KRISCH
HORTON, SHIELDS & KNOX, P.C.
90 Gillett Street
Hartford, CT 06105
(860) 522-8338

EDWARD B. O'CONNELL
DAVID P. CONDON
WALLER, SMITH & PALMER, P.C.
52 Eugene O'Neill Drive
New London, CT 06320
(860) 442-0367

THOMAS J. LONDREGAN
JEFFREY T. LONDREGAN
CONWAY & LONDREGAN, P.C.
38 Huntington Street
New London, CT 06320
(860) 447-3171

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does the Takings Clause of the Fifth Amendment contemplate that an economically distressed city may satisfy the Clause's public use requirement if that city employs its eminent domain power to condemn private property in order to reverse decades of economic decline, create thousands of jobs and significantly increase property taxes and other sources of revenue for the city, as long as the proposed condemnation is rationally related to the accomplishment of those goals?

LIST OF PARTIES

The petitioners, who were the plaintiffs below, are: Susette Kelo, Thelma Brelesky, Pasquale Cristofaro, Wilhelmina and Charles Dery, James and Laura Guretsky, Pataya Construction Limited Partnership and William Von Winkle.

The respondents, who were the defendants below are: the City of New London, Connecticut, and the New London Development Corporation.

RULE 29.6 DISCLOSURE STATEMENT

The New London Development Corporation is a non-stock, non-profit economic development corporation designated by the City of New London, pursuant to Conn. Gen. Stat. §8-188, as the official development agency of the City of New London.

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STATEMENT OF THE CASE

The respondent city of New London has suffered through decades of economic decline. (Pet. App., 196, 272-73).[1] These economic woes – which include an unemployment rate substantially higher than the rest of the state, a shrinking population, a dearth of new home and business construction and the 1996 departure of one of the region's principal employers – caused the Connecticut Office of Planning and Management to designate New London a "distressed municipality". (Pet. App., 272-73). Faced with this untenable economic situation, the respondent New London Development Corporation (NLDC) planned a development project for the city's Fort Trumbull section, the Fort Trumbull Municipal Development Plan (MDP), that would, in the words of the trial court, "provide an economic and social uplift for [the] city – jobs that will provide the underemployed or unemployed new hope, new tax monies so the tax burden on the community can be lifted and new programs and projects for the city. . . . " (Pet. App., 197). The goal of the MDP – to rejuvenate New London's dying economy – clearly constitutes a public use and justifies the taking of the petitioners' properties through eminent domain.

The NLDC was established in 1978 to assist the city in planning economic development. (Pet. App., 3). The findings made by the trial court regarding the steady deterioration of New London's economy from the 1970's onwards demonstrate the dire need for such planning:

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[1] All references in the respondents' brief in opposition to the opinion of the Connecticut Supreme Court and the memorandum of decision of the trial court are to versions of those decisions appearing in the Appendix to the Petition for a Writ of Certiorari.

What is New London's situation? New London has been designated a "distressed municipality" by the state Office of Planning and Management. Since 1970 the population of New London has been declining. It has a higher rate of unemployment than the region where it is located and than the state. The Naval Undersea Warfare Center has closed down along with two other uses supported by NUWC, which delivered a substantial blow to the city's economy. Housing starts are almost nonexistent and there has been little reinvestment in the city. . . . [T]he "distressed municipality" classification takes into account all these just mentioned factors – age of the housing stock, lack of economic growth, and population growth, a high percentage of poverty and of subsidized housing. New London is a small city with relatively little open land to develop. It also has a high degree of non-taxable property – 56 percent.

The people preparing the MDP had available to them information in several reports corroborating the foregoing bleak picture. The Environmental Impact Evaluation (EIE) completed in November 1998, reported the city's population had not been lower since 1930. Its unemployment was 7.6 percent, whereas Norwich was at 6.3 percent, Groton at 4.7 percent, and the state at 4 percent. Over the past twenty years, the city's economy has been outperformed by the region and the state. The regional labor market was up 45 percent, the state 40 percent and New London 17 percent. Sixty-one percent of the city's housing was built before 1950 with a high percentage of vacant housing. . . . As regards the Fort Trumbull area itself, there was an 82 percent vacancy rate for non-residential buildings

and a 20 percent rate for noncommercial property. The tax revenue for this entire 90-acre area is only $325,000, which is considered low. A building inventory dated December 11, 1998, indicates that 50 percent of the construction in the Fort Trumbull area was pre-1950. Nonresidential buildings were in poor shape with only two ranked high in long-range market potential. Less than 12 percent of residential buildings were on average or better condition in December 1998. Since 1990, the report says existing buildings in the area have undergone minimum private investment with some sections of Fort Trumbull suffering from disinvestment and owner neglect.

(Pet. App., 272-73).

In addition to the above-quoted findings – which the petitioners did not dispute, either at trial or before the Connecticut Supreme Court – the trial court describes New London as a "distressed municipality struggling with a downtown in need of development, poor job creation performance, population decline, and a limited tax base." (Pet. App., 327). In short, the trial court found New London to be a "city buffeted for decades by hard times and until recently declining prospects." (Pet. App., 196).

This bleak economic picture is a recurring theme in the opinion of the Connecticut Supreme Court as well. The Court's opinion notes the devastating effect on the city's economy of "the loss of approximately 1900 government sector positions, and the closure of the United States Naval Undersea Warfare Center in 1996. . . . " (Pet. App., 7). Later, in its discussion of the public use issue, the Court points to "the severe economic distress faced by the city, with its rising unemployment and stagnant tax

revenues. . . . " (Pet. App., 65). Finally, the Court's opinion contains several short but telling descriptions of New London as "a city just beginning to come out of the economic doldrums"; "an economically struggling city"; and "an economically distressed community." (Pet. App., 66, 104, 105).

The record is clear that New London was a city desperate for economic rejuvenation. In 1998, the opportunity for such rejuvenation arose when Pfizer, Inc., a world leader in pharmaceutical development, announced its plan to build a global research facility in New London, on a site adjacent to the Fort Trumbull section in which the petitioners' properties are located. In April 1998, after the Pfizer announcement, the New London city council gave its initial approval to an economic development plan for a 90-acre parcel of land in the Fort Trumbull area and the NLDC held a series of informal neighborhood meetings to educate the residents about the development process. In May 1998, the city formally authorized the NLDC to begin the development process. (Pet. App., 4).

As part of that process, the NLDC considered six possible plans of action for the Fort Trumbull area, five of which the NLDC ultimately rejected.[2] (Pet. App., 7).

[2] The alternate plans considered and rejected by the NLDC were: "(1) no action, with the assumption that some development activities would proceed under the direction of other entities, such as the United States Navy, without action by the development corporation; (2) recreational and cultural facilities to complement the adjacent state park; (3) residential construction with minor amounts of retail and office space; (4) a business campus supported by the hotel and conference center; and (5) two mixed use alternates combining residences, recreational, commercial, hotel and retail uses in differing arrangements." (Pet. App., 7 n.6).

Indeed, the development plan actually selected by the NLDC was the result of a painstaking process that included the preparation of an Environmental Impact Evaluation, a marketing study, topographical, floodplain and soil studies, a relocation plan, a building inventory in the Fort Trumbull section, and a series of public hearings and neighborhood meetings. (Pet. App., 4, 102, 103, 195, 268-69, 299-302).

The development plan area chosen by the NLDC after this careful selection process will occupy approximately ninety acres along the Thames River in New London adjacent to the Pfizer research facility and Fort Trumbull State Park. The area includes thirty-two acres formerly occupied by the now-defunct United States Naval Undersea Warfare Center. (Pet. App., 4). The plan divides the ninety acres into seven parcels:

- Parcel 1: A waterfront hotel and conference center, marinas for tourist boats and commercial vessels, and a public walkway along the waterfront.
- Parcel 2: Eighty new residential properties organized in a planned urban-style neighborhood and linked by a public walkway to the rest of the plan area; this parcel also includes space reserved for the new site of the United States Coast Guard Museum.
- Parcel 3: 90,000 square feet of high technology research and development office space and parking with direct vehicular access from outside the plan area.
- Parcel 4: Divided into two subparcels – 4A, which will provide "park support," including parking and

retail services; and 4B, which will include a renovated marina for both recreational and commercial boating.

- Parcel 5: 140,000 square feet of office space, parking and retail space.
- Parcel 6: Development of water-dependent commercial uses.
- Parcel 7: Additional office space and/or research and development space.

(Pet. App., 5-6). Four properties owned by three of the petitioners are located in Parcel 3. Eleven properties owned by four of the petitioners are located in Parcel 4A. (Pet. App., 6).

The potential economic benefits of this plan to the people of New London are enormous. According to the Connecticut Supreme Court, the plan

> is expected to generate approximately between: (1) 518 and 867 construction jobs; (2) 718 and 1362 direct jobs; and (3) 500 and 940 indirect jobs. The composite parcels of the development plan also are expected to generate between $680,544 and $1,249,843 in property tax revenues for the city, in which 54 percent of the land area is exempt from property taxes.

(Pet. App., 7). As found by the trial court, this influx of jobs and revenue will be critical in continuing the economic revitalization of the city. (Pet. App., 196, 282, 327).

In early 2000, the NLDC board approved the development plan; the New London city council approved it shortly thereafter and authorized the NLDC to acquire the

properties located in the plan area.[3] In October 2000, after months of unsuccessful negotiations with the petitioners, the NLDC voted to acquire their properties by eminent domain. In November 2000, the NLDC brought condemnation actions for the petitioners' properties. (Pet. App., 8). In December 2000, the petitioners filed an eight-count complaint seeking permanent injunctive relief barring the seizure and demolition of their properties. (Pet. App., 2, 8).

After a seven-day bench trial, the trial court upheld the takings with respect to the four properties located in Parcel 3, but agreed with the petitioners with respect to the eleven properties located in Parcel 4A and granted permanent injunctive relief as to those eleven properties. (Pet. App., 9). The trial court determined that the taking of property for a development plan that has the economic revitalization of a distressed city as its purpose satisfies the public use requirement of both the United States and Connecticut Constitutions. (Pet. App., 28). However, with respect to Parcel 4A, the trial court found that the takings were improper because the statements of public use were too uncertain to allow it to determine whether they were necessary to the fulfillment of the redevelopment plan. (Pet. App., 343-50).

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[3] As required by Connecticut law; see Conn. Gen. Stat. §8-191; the Connecticut Department of Economic and Community Development, the Connecticut Department of Environmental Protection, the Connecticut Office of Policy and Management and the Southeastern Connecticut Council of Governments also approved the development plan. (Pet. App., 8 n.8).

The petitioners appealed[4] and the respondents cross appealed the trial court's decision; and the Connecticut Supreme Court transferred the appeal and cross appeal to itself pursuant to Conn. Gen. Stat. §51-199(c). (Pet. App., 2 n.3). In a 4-3 decision, the Court held that

> the public use clauses of the federal and state constitutions authorize the exercise of the eminent domain power in furtherance of a significant economic development plan that is projected to create in excess of 1000 jobs, to increase tax and other revenues, and to revitalize an economically distressed city, including its downtown and waterfront areas.

(Pet. App., 2). The Court therefore upheld the trial court's ruling with respect to Parcel 3. The Court further held that the trial court's findings with respect to the necessity of the takings on Parcel 4A were clearly erroneous and therefore remanded the case to the trial court with direction to render judgment for the defendants with respect to the eleven properties located in Parcel 4A. (Pet. App., 133).

In reaching these conclusions, the majority heeded this Court's prior decisions on the scope of the public use requirement – specifically *Berman v. Parker*, 348 U.S. 26 (1954), and *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984) – and adopted a "broad purposive approach to the interpretation of the federal public use clause". (Pet. App., 39). This approach, in keeping with the deference to the legislature mandated in *Berman* and *Midkiff*, emphasizes "the legislative purpose and motive behind the

[4] In addition to their claim regarding the scope of the public use requirement of the federal constitution, the petitioners' appeal raised numerous issues of state law, none of which are before this Court.

taking, and give[s] substantial deference to the legislative determination of purpose." (Pet. App., 42).

Three justices concurred in part and dissented in part (in one opinion authored by Associate Justice Zarella). As an initial matter, the three dissenters "agree[d] with the conclusion of the majority" that "private economic development projects . . . which create new jobs, increase tax revenue, and contribute to urban revitalization, satisfy the takings clauses of the federal and state constitutions." (Pet. App., 171). The dissent also conceded that there was "very little evidence" that the development plan "was executed primarily for the benefit of private interests." (Pet. App., 186). However, the dissent took issue with the analytical process employed by the majority, which it viewed as too deferential. In place of the majority's "purposive" test, the dissent called for a heightened degree of judicial scrutiny to ensure that a taking for economic development will, in fact, result in a public benefit. (Pet. App., 134-90).

The petitioners subsequently filed a motion for reconsideration, which the Connecticut Supreme Court denied on April 20, 2004. (Pet. App., 427). On July 19, 2004, the petitioners filed their petition for a writ of certiorari asking this Court to review only "the limits under the public use requirement of the U.S. Constitution when government takes land for private economic development." (Pet., 5-6).

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I. THE DECISION OF THE CONNECTICUT SUPREME COURT THAT THE REVITALIZATION OF AN ECONOMICALLY-DISTRESSED CITY IS A PUBLIC USE WITHIN THE MEANING OF THE FIFTH AMENDMENT FOLLOWS THE CLEAR PRECEDENT LAID DOWN BY THIS COURT IN *BERMAN V. PARKER* AND *HAWAII HOUSING AUTHORITY V. MIDKIFF*.

The petitioners attempt to portray this case as presenting a substantial and unresolved question of federal constitutional law concerning the scope of the Fifth Amendment's public use requirement. In fact, the supposedly novel issue that the petitioners claim is crying out for attention is actually controlled by this Court's decisions in *Berman*, *supra*, and *Midkiff*, *supra*. The Connecticut Supreme Court's decision that the revitalization of an economically-distressed city is a valid reason to condemn private property, far from being radical or groundbreaking, is merely the natural outgrowth of the bedrock principle of those two cases – i.e., deference to a legislative determination of public use and the means chosen to effectuate that use. As such, *certiorari* is unwarranted.

A. This Court requires great deference to a legislative determination of what constitutes a public use.

It is black letter law that a reviewing court must accord great deference to a legislative determination of public use. As this Court noted in *Berman*, the power of eminent domain is merely one expression of a state's police power, which is the bailiwick of the legislature, and not

the judiciary. *Berman*, 348 U.S. at 32. *Berman* is clear as to the limits of judicial authority in this area:

> Subject to specific constitutional limitations, when the legislature has spoken, *the public interest has been declared in terms well-nigh conclusive*. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation . . . . This principle admits of no exception merely because the power of eminent domain is involved. *The role of the judiciary in determining whether that power is being exercised for a public purpose is an extremely narrow one.*

Id. (emphasis added).

Thirty years later, in *Midkiff*, this Court reiterated and refined the holding of *Berman*. Although the courts have a role to play in reviewing the determination of a public use, that role "is an extremely narrow one." *Midkiff*, 467 U.S. at 240 (quoting *Berman*, 348 U.S. at 32). Because "[t]he 'public use' requirement is thus coterminous with the scope of a sovereign's police powers[,]" *Midkiff*, 467 U.S. at 240, the standard of review for Takings Clause cases is extremely deferential: "[W]here the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Id.* at 241. Therefore, a court should be unwilling to "substitute its judgment for a legislature's judgment as to what constitutes a public use 'unless the use be *palpably without reasonable foundation*.'" *Id.* (emphasis added) (quoting *United States v. Gettysburg Electric R. Co.*, 160 U.S. 668, 680 (1896)).

Moreover, the need for such deference – which was recognized by the Connecticut Supreme Court in the present case – does not depend on the nature of the public use at issue. Whether the purpose to be served by a condemnation is the elimination of blight (*Berman*), the dissolution of an oligarchic property ownership structure (*Midkiff*), or the revitalization of a depressed city through the creation of thousands of jobs and an increase in tax and other revenues, the *principle* remains the same: Unless the proffered public use is "palpably without reasonable foundation," a reviewing court should not go beyond its established role and second guess the legislature's determination of public use or a city's good-faith attempt to achieve it. As this Court recognized in *Berman* and *Midkiff*, state and municipal elected officials, and not unelected judges, are best suited to the task of serving the public interest in this area.

The petitioners seek to distinguish *Berman* and *Midkiff* based on the specific public purposes discussed in those two cases. The petitioners contend that while the elimination of blight and the regulation of oligopolies are traditional exercises of the police power, "neither *Berman* nor *Midkiff* necessarily controls how courts should evaluate the constitutionality of eminent domain for the sole purpose of economic development." (Pet., 24). This argument elides the crucial point of both cases, namely, that courts should be loath to question a legislative judgment as to public use or the means chosen by a municipality to effectuate that use. At the end of the day, it is therefore irrelevant that this case presents a *different* public purpose – the economic revitalization of a depressed city – because *Berman* and *Midkiff* dictate the outcome of this

case based not on their specific public purposes, but on their jurisprudential attitude.

B. The Connecticut Legislature has declared economic development to be a public purpose, and the revitalization of New London through the proposed redevelopment plan will further that purpose.

As the Connecticut Supreme Court noted in its opinion, the Connecticut Legislature has clearly and unequivocally determined economic development, and the acquisition of private property necessary to further such development, to be public uses:

> It is found and declared that the economic welfare of the state depends upon the continued growth of industry and business within the state; that the acquisition and improvement of unified land and water areas and vacated commercial plants to meet the needs of industry and business should be in accordance with local, regional and state planning objectives; that such acquisition and improvement often cannot be accomplished through the ordinary operations of private enterprise at competitive rates of progress and economies of cost; that permitting and assisting municipalities to acquire and improve unified land and water areas and to acquire and improve or demolish vacated commercial plants for industrial and business purposes and, in distressed municipalities, to lend funds to businesses and industries within a project area in accordance with such planning objectives are public uses and purposes for which public moneys may be expended; and that the necessity in

> the public interest for the provisions of this chapter is hereby declared as a matter of legislative determination.

Conn. Gen. Stat. §8-186.

This statement – that ensuring Connecticut's economic welfare by promoting the growth of business and industry is a public use – is entitled to great deference from a reviewing court. However, even if it were not, it would satisfy this Court's broad view of the state's police power. Although that power is not readily susceptible of a complete definition, it clearly encompasses the traditional function of legislative government to enact economic, commercial and social legislation. *Midkiff*, 467 U.S. at 239-40. After all, among the diverse activities that this Court has held to fall within the police power are: public safety; see *City of Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424, 439 (2002); control over advertising; see *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 541 (2001); the establishment of regulatory or licensing schemes; see *Cleveland v. United States*, 531 U.S. 12, 21 (2000); and the compensation of personal injuries through tort remedies; see *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996).

Certainly, promoting the economic health of a state by encouraging the development of new business and industry – and thereby ensuring jobs for that state's citizens and tax revenues for that state's coffers – qualifies as an exercise of the police power as well. Indeed, the Connecticut Supreme Court was unanimous on this point. (Pet. App., 42, 172). As the trial court observed, New London's economic distress is a condition "just as worthy of attention and dangerous to the economic and moral health of

the state as slum or blighted areas. . . . " (Pet. App., 255 n.10).

In this case, there can be little doubt that the development plan is rationally related to accomplishing the goal of promoting the state's economic health and encouraging the development of new business and industry – and the Connecticut judiciary properly "takes into account *the actual public benefit* from the taking." (Pet. App., 67) (emphasis added). As set forth *supra*, the plan

> is expected to generate approximately between: (1) 518 and 867 construction jobs; (2) 718 and 1362 direct jobs; and (3) 500 and 940 indirect jobs. The composite parcels of the development plan also are expected to generate between $680,544 and $1,249,843 in property tax revenues for the city, in which 54 percent of the land area is exempt from property taxes.

(Pet. App., 7). In addition, the plan is projected to offer 230,000 square feet of space for offices, retail shops and industrial and other types of research and development. (Pet. App., 5-6). There simply are no grounds to say that declaring these uses to be of substantial benefit to the public is "palpably without reasonable foundation." *Midkiff*, 467 U.S. at 241. Nor have the petitioners shown that the trial court's factual determination, upheld on appeal, that *this* development plan is primarily for the public purpose of economic development, was improper. The Connecticut Supreme Court also was unanimous on this point.

In addition, in assessing the relationship between the declared public use and the means chosen to achieve it in New London, one must consider the economic doldrums

that prompted this redevelopment. As set forth in detail *supra*, New London has been depressed for decades, deteriorating economically under the weight of a declining population; unemployment significantly higher than the rest of Connecticut; an underdeveloped tax base; and the loss of one of the region's principal employers. (Pet. App., 7-8, 272-73). Seen in the light of these dire circumstances, the rejuvenation of New London's dying economy clearly is a public use, and the means chosen to effectuate that use – i.e., encouraging the development of business and industry by creating a locale for such business and industry to be situated – are more than reasonable.

C. The Decision of the Connecticut Supreme Court Does Not Nullify the Public Use Requirement.

Finally, the petitioners' assertion that the purposive standard adopted by the Connecticut Supreme Court to evaluate municipal claims of public use "nullifies the public use clause of the U.S. Constitution" is without merit. First, the Court's analysis is consistent with the deference mandated by this Court in *Berman* and *Midkiff*. Neither of those cases even hinted at the need for a more searching level of scrutiny so long as the ends sought to be achieved through condemnation were ones in keeping with a state's police power.

Second, to the extent that the petitioners raise the specter of the arbitrary or capricious exercise of the power of eminent domain by municipalities without any judicial check, the Connecticut Supreme Court has demonstrated several times in the past few years that it will not tolerate such nefarious behavior. See *Aposporos v. Urban Redevelopment Commission*, 790 A.2d 1167 (Conn. 2002) (reversing

condemnation due to inadequate findings of blight); *Pequonnock Yacht Club, Inc. v. City of Bridgeport*, 790 A.2d 1178 (Conn. 2002) (affirming injunction against condemnation due to failure of defendants to consider integration of plaintiff's non-blighted property); *AvalonBay Communities, Inc. v. Town of Orange*, 775 A.2d 284 (Conn. 2001) (affirming injunction barring implementation of industrial park plan adopted in bad faith as pretext to thwart affordable housing development). Indeed, the Court's opinion in the present case reinforces that notion – specifically the Court's detailed discussion of the "particularly egregious set of facts" that led the Illinois Supreme Court to declare a taking unconstitutional in *Southwestern Illinois Dev. Auth. v. National City Environmental, LLC*, 768 N.E.2d 1, 9-11 (Ill.), *cert. denied*, 537 U.S. 880 (2002) (*SWIDA*). The Connecticut Court's express acknowledgement that it may be appropriate to invalidate a taking when, as in the *SWIDA* case, an agency clearly has exercised its eminent domain authority for the benefit of another, specific private entity, belies the petitioners' contention that the *Kelo* decision drains the meaning and substance out of the public use requirement.

In sum, the petitioners' assertion that the Connecticut Supreme Court's decision is part of a disturbing "national phenomenon," and that there is an "urgent need for this Court to address the limits of eminent domain authority," is really no more than an exercise in the avoidance of unfavorable precedent. (Pet., 9). As the Connecticut Supreme Court concluded, the rule of deference laid down in this Court's decisions in *Berman* and *Midkiff* in fact controls this case and makes review unnecessary because the perceived federal question of great importance is a mere chimera.

II. THERE IS NO SIGNIFICANT CONFLICT BETWEEN THE STATES AS TO THE SCOPE OF THE PUBLIC USE REQUIREMENT UNDER THE FEDERAL CONSTITUTION.

Faced with the stark reality that this Court's jurisprudence is inhospitable to their claims, the petitioners attempt to attract this Court's attention by manufacturing a massive conflict among the states regarding the scope of the public use requirement under the federal constitution. However, the dispute posited by the petitioners is, in fact, almost entirely a false conflict not worthy of this Court's intervention because the vast majority of the state court decisions cited involve an interpretation of *only* a state constitutional provision. As such, certiorari is unwarranted because this Court's role as final arbiter of the meaning of the federal constitution is not significantly implicated by this case.

As the petition for certiorari notes, eighteen states, including Connecticut, have considered whether economic development or revitalization is a public use: Arkansas, Delaware, Florida, Illinois, Kansas, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New York, North Dakota, South Carolina and Washington. The petitioners separate those states based on two criteria: (1) whether they hold economic development or revitalization to be a public use; and (2) what test they use to scrutinize municipal claims of public use. On these two bases, the petitioners warn of "confusion" among the states that necessitates this Court's intervention. (Pet., 10-21).

These two criteria ignore the most relevant factor for *certiorari* purposes, namely, whether the decisions in

question involve an interpretation of the public use requirement of the *federal* constitution. Tellingly, the petitioners consign the answer to this key question to three footnotes in their petition – not a surprising choice of placement, given what it reveals about the purported constitutional conflict. (Pet., 10-11 n.3-5).

Of the eighteen state court decisions cited by the petitioners, eleven clearly involve *only* the construction of a state constitutional provision: Arkansas, *City of Little Rock v. Raines*, 411 S.W.2d 486, 491 (Ark. 1967) (interpreting art. II, §§22 & 23 of the Arkansas Constitution); Florida, *Baycol, Inc. v. Downtown Dev. Auth.*, 315 So. 2d 451, 455-58 (Fla. 1975) (interpreting art. X, §6 of the Florida Constitution); Kentucky, *City of Owensboro v. McCormick*, 581 S.W.2d 3, 6-8 (Ky. 1979) (interpreting §§13 & 242 of the Kentucky Constitution); Maine, *Opinion of the Justices*, 131 A.2d 904, 907-08 (Me. 1957) (interpreting art. I, §§6 & 21, and art. IV, pt. 3, §1 of the Maine Constitution); Maryland, *Prince George's County v. Collington Crossroads, Inc.*, 339 A.2d 278, 286-89 (Md. 1975) (interpreting art. III, §40 of the Maryland Constitution); Massachusetts, *Opinion of the Justices*, 250 N.E.2d 547, 550 (Mass. 1969) (interpreting various clauses of art. 89 of the Massachusetts Constitution); Michigan, *County of Wayne v. Hathcock*, ___ N.W.2d ___, 2004 WL 1724875 (Mich., July 30, 2004)[5] (interpreting art. 10, §2 of the

[5] *Hathcock*, which was decided after the petitioners filed their petition, overruled *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981), which the petitioners cited, on the question of whether art. 10, §2 of the Michigan Constitution permitted a municipality to take property through eminent domain in order to alleviate unemployment and revitalize a community's economic base. *Hathcock*, ___ N.W.2d at ___, 2004 WL 1724875 at *8-15.

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Michigan Constitution); New Hampshire, *Merrill v. City of Manchester*, 499 A.2d 216, 217 (N.H. 1985) (interpreting pt. I, art. 12 of the New Hampshire Constitution); New York, *Cannata v. City of New York*, 11 N.Y.2d 210, 211-12, *appeal dismissed*, 371 U.S. 4 (1962) (interpreting art. XVIII of the New York State Constitution); South Carolina, *Georgia Dept. of Transportation v. Jasper County*, 586 S.E.2d 853, 855-56 (S.C. 2003) (interpreting art. I, §13 of the South Carolina Constitution); and Washington, *In re City of Seattle/The Westlake Project*, 638 P.2d 549, 554-57 (Wash. 1981) (interpreting art. I, §16 of the Washington Constitution).

Although these eleven decisions take varying views on the constitutionality of economic development as a public use and the proper degree of scrutiny to employ, none of them discuss or interpret the federal constitution.[6] As

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Hathcock, like *Poletown*, construes only the Michigan Constitution. While it is true that *Poletown* does contain one brief reference to this Court's decision in *Berman*, the reference relates only to the principle of deference to the legislature and not any substantive analysis of the federal constitution. Nor, for that matter, does *Poletown* contain another reference to *Berman*, or any other of this Court's Takings Clause cases. In any event, given the recent demise of *Poletown*, and given the fact that *Hathcock* is devoid of any reference to either the federal constitution or federal caselaw, the petitioners' reliance on *Poletown* is moot.

[6] The petitioners characterize the Florida, Maryland and Michigan decisions as "explicitly cit[ing] to the U.S. Constitution or federal cases." (Pet., 10). This is literally true, but extremely misleading.

In *Prince George's County*, the Court of Appeals of Maryland mentions the Fourteenth Amendment to the United States Constitution in a footnote for the sole purpose of distinguishing one of its own earlier decisions. See *Prince George's County*, 339 A.2d at 287 n.4 (citing *Herzinger v. City of Baltimore*, 98 A.2d 87 (Md. 1953)). The Maryland court's ruling, however, is based entirely on its construction of the Maryland Constitution.

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such, their differing interpretations of their own state constitutions do not call for this Court's intervention. See *Arizona v. Evans*, 514 U.S. 1, 10 (1995) (United States Supreme Court is final arbiter only of meaning of United States Constitution).

In addition to those eleven state decisions based explicitly on their individual state constitutions, the decisions of two states cited by the petitioners – Kansas and Minnesota – are devoid of any citation to, or discussion of, *either* the federal constitution or their own state constitutions. See *General Building Contractors, LLC v. Board of Shawnee County Commissioners*, 66 P.3d 873 (Kan. 2003); *City of Minneapolis v. Wurtele*, 291 N.W.2d 386 (Minn. 1980). These two decisions cite and discuss only Kansas and Minnesota statutes. As neither case contains even the briefest mention of the federal constitution, neither offers any support to the petitioners' assertion of an interstate conflict over the meaning of the Takings Clause.

Finally, one state, Delaware, merely involves inconclusive *dicta*. See *Randolph v. Wilmington Housing Authority*, 139 A.2d 476, 484-85 (Del. 1958) (upholding condemnation to eliminate blight, but expressing "the very

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The petitioners' characterization of the Florida case, *Baycol*, is similarly flawed. *Baycol* cites the Fourteenth Amendment only in one footnote. *Baycol*, 315 So.2d at 455 n.3. Moreover, the entire substantive discussion in *Baycol* centers around four prior decisions of the Florida Supreme Court – *Grubstein v. Urban Renewal Agency of Tampa*, 115 So.2d 745 (Fla. 1959), *Panama City v. State*, 93 So.2d 608 (Fla. 1957), *Gate City Garage, Inc. v. City of Jacksonville*, 66 So.2d 653 (Fla. 1953), and *Adams v. Housing Authority of Daytona Beach*, 60 So.2d 663 (Fla. 1952) – none of which mention the federal constitution.

As for the Michigan decision, see footnote 5, *supra*.

gravest doubt" as to the future constitutionality of such actions). In fact, although the petitioners seek to rely on *Randolph*, it is worth noting the actual holding of that decision, i.e., that the taking was for a public purpose.

Therefore, once the wheat has been separated from the chaff, the massive conflict discussed at length in the petition boils down to a disagreement among four states: Connecticut, Illinois, Montana and North Dakota. Of these four states, Connecticut and North Dakota; see *City of Jamestown v. Leevers Supermarkets, Inc.*, 552 N.W.2d 365, 369 (N.D. 1996); have held that economic development constitutes a public use under the federal constitution; while Illinois and Montana have held that economic development is not a public use under the federal constitution; see *SWIDA*, *supra*, 768 N.E.2d at 9-11; *City of Bozeman v. Vaniman*, 898 P.2d 1208, 1214 (Mont. 1995). This is hardly the yawning constitutional chasm alluded to by the petitioners.

Moreover, as with the petitioners' bold, but ultimately greatly exaggerated, claims as to the scale of this conflict, a little digging into the three cases other than *Kelo* reveals the lead beneath the gold gilt. The clearest example of this is the Illinois case, which, although it strikes down a condemnation for private economic development, does so based largely on the egregious and unusual facts of the case – specifically the fact that the development authority acted as a "default broker" for the private developer in question.[7] *SWIDA*, 768 N.E.2d at 10. It is axiomatic that if

[7] Although *SWIDA* cites to the federal constitution and to *Berman* and *Midkiff*, it relies more heavily on two of its own prior decisions, *Gaylord v. Sanitary District*, 68 N.E. 522, 524 (Ill. 1903), and *Limits Industrial R.R. Co. v. American Spiral Pipe Works*, 151 N.E.2d 567,

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the public purpose proffered for a taking is a charade formulated to cover up municipal misbehavior, a court should intervene. Such may have been the case in *SWIDA*, but it is emphatically not so here. The public benefits to the citizens of New London of the development plan are direct and substantial, and the petitioners do not claim that the decision to take their properties was the result of municipal malfeasance.

As for the Montana and North Dakota cases, they require a close inspection simply to locate *any* discussion of the federal constitution. Although both cases do mention the Fifth Amendment, their analysis is cursory at best – and neither case even mentions *Berman*, *Midkiff*, or any other of this Court's Takings Clause decisions. This Court should not exercise its *certiorari* discretion to resolve a supposed conflict between the states when two of the four states in question have engaged in no real substantive analysis of the federal issue.

Viewed without the entrancing fog of the petitioners' rhetoric, this disagreement between four state courts of last resort is simply too minor a conflict to merit this Court's attention. This Court already has struck the appropriate balance between the role of the courts and the

569-70 (Ill. 1926), to engraft onto Illinois law a requirement that property taken for a development project be available for public use as of right. *SWIDA*, 768 N.E.2d at 9-10. This Court specifically rejected that proposition in *Midkiff*, 467 U.S. at 243-44; and it is a creature of state law, not federal constitutional analysis. *Gaylord* expressly was premised on "the language of the statute, the constitution of this State and the holdings of this court as to what is a public use, within the meaning of the constitution. . . . " *Gaylord*, 68 N.E. at 583. *Limits Industrial* mentions neither the federal constitution nor federal precedent.

role of the legislature in this area. The constitutional analysis envisioned by *Berman* and *Midkiff* provides a meaningful and workable framework for determining the legitimacy of condemnations, and the standard of review enunciated by the Connecticut Supreme Court merely reinforces that appropriate standard of review for governmental takings. The respondents' position is not intended to denigrate the importance of private property rights. However, those rights already enjoy the necessary constitutional protections – and the numerous cases from the Connecticut Supreme Court and other state courts demonstrate that these protections are far from vitiated.

At the end of the day, the power, upheld by this Court on countless occasions, of the legislature to enact social legislation and implement it via the power of eminent domain is vital to the health and safety of the public whom the legislature represents. As a part of that power, comprehensive redevelopment is sometimes necessary to correct the myriad of social and economic ills that plague economically-distressed cities such as New London – problems such as crime, inefficient use of land and parking, and other limitations on the beneficial commercial and cultural activities vital to the health of a city and the well-being of its citizenry. As the voice of the public, the legislature is uniquely suited to determine the best interests of the communities it serves.

CONCLUSION

For the foregoing reasons, the respondents respectfully pray that the petition for a writ of *certiorari* to review the decision of the Connecticut Supreme Court be denied.

Respectfully submitted,

WESLEY W. HORTON
Counsel Of Record
DANIEL J. KRISCH
HORTON, SHIELDS & KNOX, P.C.
90 Gillett Street
Hartford, CT 06105
(860) 522-8338

THOMAS J. LONDREGAN
JEFFREY T. LONDREGAN
CONWAY & LONDREGAN, P.C.
38 Huntington Street
New London, CT 06320
(860) 447-3171

EDWARD B. O'CONNELL
DAVID P. CONDON
WALLER, SMITH & PALMER, P.C.
52 Eugene O'Neill Drive
New London, CT 06320
(860) 442-0367

Counsel for the Respondents